Supreme Court, U.S.
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OFFICE OF

No.

IN THE

Supreme Court of the United States

SILVANA GERMENJI,
ROXHERSI GERMENJI, Minor Child,
Petitioners

v.

ALBERTO GONZALES, ATTORNEY GENERAL
OF THE UNITED STATES
Respondent

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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Question Presented

Whether the Third Circuit Court of Appeals exceeded the scope of its review and went against long-established principles of administrative review when, in upholding the decision of the Board of Immigration Appeals ("BIA"), it substituted its own factual findings for those of the BIA and then applied the law to such factual findings.

Parties to the Proceedings

The parties to the proceedings in the Third Circuit Court of Appeals included the Attorney General of the United States and the petitioners Silvana Germenji and Roxhersi Germenji, a minor child. There are no parties to the proceedings other than those named in the petition.

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The Petitioners, Silvana Germenji and Roxhersi Germenji, respectfully petition this Court for a writ of certiorari to review the judgment and opinion of the Third Circuit Court of Appeals, filed on June 7, 2005, the petition for rehearing of which was denied by such court on August 5, 2005.

Opinions Below

The opinion of the Third Circuit Court of Appeals, which is the subject of this petition, was filed on June 7, 2005, and is attached as Appendix A. Although not selected for publication in the Federal Reporter, it appears at 132 Fed.Appx. 990 (3d Cir. 2005).

The decision of the Board of Immigration Appeals, dated February 5, 2005, is attached as Appendix B.

The decision of the Immigration Judge, dated July 8, 2002, is attached as Appendix C.

The Third Circuit Court of Appeals one-page order, dated August 5, 2005, denying panel rehearing and rehearing *en banc* is attached as Appendix D.

Jurisdiction

The decision of the Third Circuit Court of Appeals to be reviewed was filed on June 7, 2005. That court denied panel rehearing and rehearing *en banc* on August 5, 2005. This petition is filed within 90 days of that date. Rules 13.1 and 13.3. The Petitioners invoke this Court's jurisdiction under 28 U.S.C. §1254.

Statutory Provisions Involved

1. Section 101(a)(42)(A) of the Immigration and Nationality Act ("INA"), 8 U.S.C. 1101(a)(42)(A), provides in pertinent part:

> The term "refugee" means * * * any person who is outside any country of such person's nation[ality] or, in the case of a person having no nation[ality], is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion[.]

2. Section 1252 of Title 8 of the United States Code (1996)[1] provided in pertinent part:

> Judicial Review of Orders of Removal
>
> * * * * *
>
> (b) Requirement for Review of Orders of Removal
>
> * * * * *
>
> (4) Scope and standard for review
>
> > ***(A) the court of appeals shall decide the petition only on the administrative record on which the order of removal is based,
> >
> > (B) the administrative findings of fact are conclusive unless any reasonable adjudicator

[1] Amended by §101(e) [revising (b)(4)] and §106(a) [revising (b)(9)] of REAL ID Act, P.L. 109-13 (5/11/05). Such amendments apply, to the extent relevant here, to asylum applications made after the date of enactment of the REAL ID Act. The analysis of this case would not be materially affected by these amendments.

would be compelled to conclude to the contrary[.]

3. Section 208 of the INA, 8 U.S.C. 1158, provides in pertinent part:

Asylum

(a) Authority to Apply for Asylum

***(1) Any alien who is physically present in the United States or who arrives in the United States ***, irrespective of such alien's status, may apply for asylum in accordance with this section[.]

*****

(d) Asylum Procedure

(1) *** The Attorney General shall establish a procedure for the consideration of asylum applications filed under subsection (a).

Statement of the Case

1. Summary of Law

The INA defines the term "refugee" to mean an alien who is unwilling or unable to return to his home country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. §1101(a)(42)(A). An alien who is a refugee is eligible to be considered for asylum in the United States, provided that the alien is not disqualified from consideration because of past conduct such as participating in persecution or committing a particularly serious crime. 8 U.S.C. §1158(b)(1) and (2).

The Attorney General is vested with discretion whether to grant asylum to an alien who satisfies the statutory definition of a refugee. 8 U.S.C. §1158(b)(1).

Congress has authorized the Attorney General to establish "requirements and procedures" governing asylum applications. 8 U.S.C. 1158(b)(1).

An alien who is charged with being removable from the United States may present an asylum claim as a defense to removal. *See generally* 8 C.F.R. 208.2-208.5. Such a claim, and other issues relevant to whether the alien will be removed from the United States, are decided by an immigration judge after a hearing. *See* 8 C.F.R. 208.2(b) and (c). The asylum decisions of immigration judges are appealable to the Board of Immigration Appeals ("BIA"), which has the power to conduct a de novo review of the record, to make its own findings of fact, and to determine independently the sufficiency of the evidence. *See* 8 C.F.R. 1003.1. A finding by the BIA that an asylum applicant failed to carry his burden of proof is reviewable, on judicial review of the final order of removal entered against the alien, by the federal court of appeals for the circuit in which the immigration judge's hearing was held. *See* 8 U.S.C. 1252(b)(2) (1996).

Judicial review of the BIA's decisions, including those addressing asylum issues, is limited by statute. See 8 U.S.C. 1252(b)(4)(1996). Most important here, the court of appeals must "decide the petition [for review] only on the administrative record on which the order of removal is based," 8 U.S.C. §1252(b)(4)(A), and "the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. §1252(b)(4)(B).

2. Summary of Facts

Silvana Germenji was born in Tirana, Albania on November 24, 1966 in a small basement apartment. A.R. 361, 364. Since her birth, Silvana was exposed to government persecution and life long struggles as her family actively supported the anti-government movements in Albania. Members of her family were tortured, imprisoned and even killed because they opposed the Communist regime.

As an adult, Silvana and her husband attended rallies and protests organized by the Democratic Party of Albania, an anti-communist political party. A.R. 361.

After the Democratic Party was elected into power in Albania in March 1992, Silvana's husband was employed by the Ministry of Finance ("MOF") as a chief director of tax registration. His responsibilities included, among other things, inspection of companies within Tirana and the monitoring of companies' compliance with national tax laws. A.R. 361-62.

In June 1997, the Socialist Party, comprised of many former Communists, won elections held in Albania. A.R. 361. In early 1998, while on the job, Silvana's husband inspected a company called "Magjik Bingo". He found that the company had been falsifying its tax returns and hiding income to avoid taxation by the government. Silvana's husband immediately reported these irregularities to the MOF. Silvana's husband was told by his superior to ignore the company's violations because they had connections with "those above". AFFI 2. He was further told that the head of Magjik Bingo was a Socialist with strong connections to the Socialist Party's leader, Fatos Nano. By reporting the company to his boss, Silvana's husband exposed himself and his family to great danger. Although the Communists were no longer held formal power in Albania, many former party

leaders continued to operate within the ruling Socialist party. A.R. 362.

Following the inspection of Magjik Bingo by Silvana's husband, there followed a campaign of threats and harassment against the family. These included threatening telephone calls and the demotion of Silvana's husband at the MOF. Fearing for their safety, the family fled to Greece in 1998 where they stayed for two years. In August 2000, only a few months after returning to Albania, Silvana was attacked in the street. From the statements made by her assailants, it was clear to Silvana that the attack was connected to her husband's inspection of Magjik Bingo. A.R. 362.

Soon after the attack on her, Silvana and her husband made plans for her and their only child, Roxhersi Germenji, to leave Albania as soon as possible. She bought fake documents for herself and her son, and quickly left the country. A.R. 362.

3. Proceedings to Date

The Petitioners received a positive credible fear determination on September 27, 2000 in San Francisco, California, the port of their attempted entry into the United States. Subsequent to such determination, the Petitioners were released from immigration custody. A.R. 40.

At a hearing held on July 8, 2002, the Immigration Judge ("IJ") denied the Petitioners' applications for asylum withholding of removal and withholding of removal under the Convention Against Torture. The primary basis for the IJ's decision was his finding that Silvana was not credible. App., *infra*, A-18.

The Petitioners timely appealed the IJ's decision to the BIA. In its decision dated February 5, 2004, App., *infra*,